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In The

# Supreme Court of the United States

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**October Term, 1939.**

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**No.**

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HAROLD H. MOORE, Bankrupt,
*Petitioner,*

v.

LEONARD HORTON, Trustee in Bankruptcy,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Harold H. Moore, Bankrupt, respectfully shows:

### *STATEMENT OF THE MATTER INVOLVED.*

The petitioner's father, Alanson A. Moore, died in Detroit in 1928 (R. 14). By his will he gave both real estate and personal property to trustees, in trust to pay

the income to his widow for life, with advances of some or all of the principal to the widow as the trustees might deem proper "for her comfortable care and support, and in order to enable her to continue in her present station in life" (R. 10). The will directed that upon the widow's death the trustees were to pay over one-half of anything remaining in the trust to the petitioner, if he were then living; otherwise such share was to go to others (R. 10-11). The trust property was located in Michigan (R. 26-30).

On March 12, 1936, while the widow was still living, the petitioner was adjudicated bankrupt (R. 1, 6). In his schedules he disclosed his expectancy under the trust, but averred that it was not such an interest as would pass to his trustee in bankruptcy (R. 6, 13). The petitioner was granted his discharge on April 19, 1937 (R. 1). The widow died November 19, 1938 (R. 22).

In the course of the bankruptcy proceedings the Referee ruled that the petitioner's expectancy in such trust was an asset for the benefit of creditors, and ordered it sold (R. 14). The District Court (O'Brien, J.) reversed the Referee's ruling; the opinion is not officially reported, but it is printed in the Record, pages 34-39. The District Judge held that under the Michigan law the bankrupt had only a future contingent interest in the trust corpus, of which the local law permitted no present transfer, though the bankrupt might contract to transfer it potentially, if and when he came into its enjoyment; and by authority of *In re Martin (C. C. A. 6, 1931), 47 F. (2nd) 498,* and *Suskin & Berry, Inc., v. Rumley (C. C. A. 4, 1930), 37 F. (2d) 304,* he determined that the Bankruptcy Act did not transfer such an interest to the trustee in bankruptcy. The court found as a fact:

"Bankrupt's father died in 1928. * * * His

primary duty and wish was to provide for his widow during her lifetime. Actually, she survived him ten years. In the meantime, his trust estate has felt the effects of the depression; its present nature and extent is indicated by bankrupt's petition to stay proceedings pending determination of his petition for review of the referee's order. When he was adjudicated a bankrupt in March, 1936, two years and eight months before his mother's death, he could not use his interest in his father's estate to meet his obligations, and it was then, of course, uncertain whether he would survive his mother and thus become vested with an interest which he could thus use. An examination of the asset items will lead to the conclusion that no one would have purchased bankrupt's contingent interest in them except as a gamble and at a greatly sacrificed price. The decisions applying the Bankruptcy Act, particularly those above cited, establish that it was not the intention that an unfortunate debtor must sacrifice such a paternal gift in order to have the benefit of the Bankruptcy Act" (R. 38).

The Circuit Court of Appeals for the Sixth Circuit (Hicks, Simons and Hamilton, JJ.) reversed the District Court's ruling (R. 45). The opinion is reported in 110 *F. (2d) 189*, and in *42 A. B. R. 485*, and is printed in the Record, pages 46-49. Such opinion was to the effect that the bankrupt's interest was a "contingent estate" and alienable by virtue of a Michigan statute; and the court held that the Bankruptcy Act worked a transfer of the bankrupt's interest to his trustee, citing *McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015*, and *Pollack v. Meyer Bros. Drug Company (C. C. A. 8, 1916), 233 F. 861.* A motion for rehearing was denied without opinion (R. 77).

The petitioner believes that such decision of the Circuit Court of Appeals was erroneous, and that the District Court's decision was correct.

After the petitioner was discharged in bankruptcy, and after the widow's death, the testamentary trustees turned over to the petitioner, as his half of what remained in the trust, real estate of about $15,000.00 assessed value, also certain shares of unlisted stock of uncertain value.

## *JURISDICTION.*

The petitioner invokes the jurisdiction of this court under the Act of February 13, 1925, as amended *(28 U. S. C. A. 347, 350)*. The judgment of the Circuit Court of Appeals was entered March 15, 1940 (R. 45). A petition for rehearing, seasonably filed and entertained by that court, was denied June 27, 1940 (R. 77). The present petition is filed prior to September 27, 1940.

## *QUESTIONS PRESENTED.*

1. Was the petitioner's interest in the trust, as to the real estate and as to the personal property, transferable or subject to levy under the local law of Michigan; and in deciding that it was, both as to the real estate and as to the personal property, did not the Circuit Court of Appeals decide an important question of local law in a way in conflict with applicable local decisions?

2. Was the petitioner's expectancy under his father's trust "property" within the meaning of Section 70a (5) of the Bankruptcy Act *(11 U. S. C. A. 110a)*; and in deciding that it was, did not the Circuit Court of Appeals decide an important federal question in a way in conflict with the applicable decisions of this court, and of other Circuit Courts of Appeals?

## *REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.*

1. The Circuit Court of Appeals failed to follow the local property law as announced by the local courts in *Hadley v. Henderson, 214 Mich. 157, 183 N. W. 75,* and *In re Coots, 253 Mich. 208, 234 N. W. 141.*

2. The Circuit Court of Appeals undertook to dispose of the *cestui's* interest in this trust as if such interest was real estate. It overlooked a local statute (C. L. 1929, Sec. 12982, Stat. Ann. 26.66) by which the *cestui* of a real estate trust no longer takes any real estate interest.

3. The Circuit Court of Appeals has disposed of corporation stock by following a local statute which relates to real estate only. *Dolby v. State Highway Commissioner, 283 Mich. 609 at 620, 278 N. W. 694 at 698.*

4. The Circuit Court of Appeals based its decision on a Michigan statute relating to the alienation of future interests (C. L. 1929, Sec. 12955; Stat. Ann. 26.35) but gave to that statute a construction at variance with the construction given by the Supreme Court of Michigan; *In re Coots, supra.*

5. Similar statutes are in force in many other jurisdictions, so that a new construction thereof by a Federal Court is of more than local importance.

6. The Federal and state cases are in confusion on the question of whether a trust interest, subject only to *in futuro* transfer "by estoppel" is transferable in such a sense as to pass to a trustee in bankruptcy; *3 Simes on Future Interests, Sec. 738.* Compare on the one hand, *Suskin & Berry v. Rumley (C. C. A. 4, 1930), 32 F. (2d) 304,* and *Luttgen v. Tiffany, 37 R. I. 416, 93 Atl. 182;* and

on the other hand *In re Landis (C. C. A. 7, 1930), 41 F. (2d) 700,* and *Earle v. Maxwell, 86 S. C. 1, 67 S. E. 962.*

7. It is the settled Federal rule that the bankrupt's expectancy is not "property" within the meaning of Section 70a (5) of the Bankruptcy Act, 11 U. S. C. A. 110a (5), where it depends on the discretion of others whether the bankrupt will ever enjoy the estate: *Nichols v. Eaton, 1 Otto 716, 23 L. Ed. 254; In re Harper (C. C. A. 2, 1907), 155 F. 105,* and *In re Wetmore (C. C. A. 3, 1901), 108 F. 520.* The decision below is in conflict with these authorities. The conflicting views of the various Federal Courts are causing hardship and uncertainty. An authoritative decision by this court is urgently needed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send up to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 8403, *In the Matter of Harold H. Moore, Bankrupt; Leonard Horton, Trustee, Appellant, v. Harold H. Moore, Bankrupt, Appellee*"; and that the said judgment of that court may be reversed by this court; and that your petitioner may have such other and further relief in the premises as to this court may seem meet and just.

Dated Detroit, Mich., September 12, 1940.

HAROLD H. MOORE,
By RICHARD FORD,
*Counsel for Petitioner.*

MERLIN WILEY,
HOWARD STREETER,
LEON R. JONES,
*Of Counsel.*

In The

# Supreme Court of the United States

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October Term, 1939.

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No.

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HAROLD H. MOORE, Bankrupt,

*Petitioner,*

v.

LEONARD HORTON, Trustee in Bankruptcy,

*Respondent.*

---

## BRIEF IN SUPPORT OF PETITION.

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### *OPINIONS BELOW.*

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported in *110 F. (2d) 189, 42 A. B. R. 485,* and is printed in the Record, pages 46-49. The opinion of the District Court for the Eastern District of Michigan is not officially reported but is printed in the Record, pages 34-39.

## *JURISDICTION.*

**Jurisdiction is claimed under the Act of February 13, 1925, as amended *(28 U. S. C. A. 347, 350)*. This application is made within three months after the motion for rehearing was denied in the Circuit Court of Appeals.**

## *STATEMENT OF THE CASE.*

The statement of facts in the foregoing petition (ante, page 2), in the interest of brevity, is not repeated. The will of the petitioner's father is printed in full in the Record, pages 8-12. Its pertinent provisions may be summarized in this way:

All of the estate (except for certain specific bequests) was willed to trustees to manage, collect, invest, etc. (R. 9), and to dispose of principal and income as follows: (A) To pay the income to the widow during her lifetime (R. 10). (We omit reference to the provision for an annuity to petitioner payable out of income, since this controversy only relates to the trust principal.) (B) To turn over to the widow so much of the principal as she might require for her support, etc., and the trustees might deem proper (R. 10). (C) To turn over half of anything remaining in the trust to the petitioner, if he should be living when the widow died (R. 10). (D) To turn over such half to others, if the petitioner should not survive the widow (R. 10-11). (E) To turn over the other half of the estate to the petitioner's sister. This case does not concern that portion of the estate.

This will was admitted to probate in 1928 (R. 6, 14). The petitioner was adjudicated bankrupt in 1936 (R. 1, 2, 6, 34), the creditors being chiefly the receivers of closed banks (R. 22-23). The petitioner was discharged in bankruptcy in 1937 (R. 1). The widow died in 1938 (R. 34). The Referee ruled that the bankrupt's expectancy was an asset available to the creditors (R. 14, 19). The District Court reversed the Referee's ruling (R. 34-39). The Circuit Court of Appeals reversed the District Court's order (R. 45). The bankrupt seeks a review in this court.

## *SPECIFICATION OF ERRORS.*

1. The court erred in holding that the bankrupt's future contingent interest in the trust vested in the trustee in bankruptcy.

2. The court erred in holding that under the Michigan law the bankrupt's interest in the trust was an interest which he could have transferred.

3. The court erred in holding that under the Michigan law the bankrupt's interest, in so much of the trust as related to personal property, was an interest which he could have transferred.

4. The court erred in refusing to give to local statutes (Mich. C. L. 1929, Sec. 12955, 12982 Stat. Ann. 26.35, 26.66) the construction put upon them by the local courts.

5. The court erred in holding that the bankrupt's interest in the trust was "property" within the meaning of Section 70a (5) of the Bankruptcy Act, 11 U. S. C. A. 110a (5).

## ARGUMENT.

We contend (I) that the questions here involved are of public importance; (II) that the Circuit Court of Appeals has failed to follow the decisions of the local courts on a question of local property law and the construction of local statutes which are common to many states; and (III) that in holding this bankrupt's expectancy to be "property" within the meaning of the Bankruptcy Act, the lower court decided a Federal question contrary to the decisions of this court and of the other Circuit Courts of Appeals.

### I.

### The importance of the questions involved.

The present state of the bankruptcy law with reference to expectant interests not subject to *in praesenti* transfer is described in a recent treatise (*3 Simes on Future Interests, Sec. 738)* as follows:

> "The decisions on this point have been conflicting. The Circuit Courts of Appeals in two circuits have held that such interests do not pass to the Trustee in Bankruptcy. One of these decisions, involving a Maryland estate, is inconsistent with a decision of a Federal District Court of Maryland and with a dictum of the Maryland Supreme Court. In accord with the view that the interests under discussion do not pass to the Trustee in Bankruptcy is also a decision of the Federal District Court of Vermont. To the

effect that a contingent interest transferable by estoppel, release, or 'in equity' does pass to the Trustee in Bankruptcy, is the decision of the Circuit Court of Appeals for the Seventh Circuit. That case involved Illinois property and is inconsistent with the decisions of the Illinois courts on the point, and also with a number of decisions by other state courts."

While there are differences in the local law, these differences do not account for the conflicting interpretations which the United States Courts have put on an Act of Congress. And insofar as construction of state statutes is involved in the present case, it is to be noted that many other jurisdictions have statutes similar to Mich. C. L. 1929, Sec. 12955, Stat. Ann. 26.35 (alienation of future estates in land), such as Arizona (Rev. Code 1928, Sec. 2760), California (Civil Code, Sec. 699), Delaware (Rev. Code 1935, Sec. 3698), District of Columbia (Code 1929, Title 25, Sec. 275), Georgia (Code 1933, Sec. 29-103), Idaho (Civil Code 1932, Sec. 54-109), Minnesota (Mason St. 1927, Sec. 8065), Montana (Rev. Codes 1935, Sec. 6695), New York (Real Property Law, Sec. 59), North Dakota (Comp. Laws 1913, Sec. 5277), South Dakota (Comp. Laws 1929, Sec. 284), Wisconsin (Stat. 1939, Sec. 230.35).

Other jurisdictions also have statutes similar to Mich. C. L. 1929, Sec. 12982, Stat. Ann. 26.66 (the *cestui* takes neither legal nor equitable estate), such as California (Civil Code, Sec. 863), Minnesota (St. 1927, Sec. 8095), Montana (Rev. Codes 1935, Sec. 6790), New York (Real Property Law, Sec. 100), North Dakota (Comp. Laws 1913, Sec. 5373), Oklahoma (St. 1931, Sec. 11829), South Dakota (Comp. Laws 1929, Sec. 380), Wisconsin (St. 1939, Sec. 231.16). A declaration by the Circuit Court of Appeals as to the meaning of these statutes is therefore of more than local importance.

Trust expectancies of this sort are becoming more common, due in part to income and estate taxes. All the courts have agreed that if such contingencies must be transferred to the Trustee in Bankruptcy, and offered by him at public sale, he can realize little or nothing, though the bankrupt may lose a great deal. The Circuit Court of Appeals for the Eighth Circuit has said *(Jones v. Harrison, 7 F. (2d) 461 at 465)*:

> "The result would be small benefit to the creditors, and disastrous loss to the beneficiary. Such considerations as these give an impressive force to the placing of the property in trust, as evidencing the intent of the testator to put it beyond the reach of such sacrifice and waste."

The legal status of such expectancies ought to be put beyond question and made uniform, and their sacrifice at a bankruptcy sale ought to be prevented unless the Act of Congress plainly requires it.

The questions here involved are of bankruptcy law, on which the lower courts are divided; and of the construction of statutes which are local, but common to many states. We urge that their importance is such as to merit an early review in this court.

## II.

**The Circuit Court of Appeals has decided a question of local law in a manner contrary to the determination of the local courts.**

The bankrupt's interest was that of a *cestui que trust;* whether he would enjoy any part of the estate in possession was contingent, both on his being alive at an uncertain future date, and on the trustees not exercising their discretionary right of consuming the trust corpus by advancing it to the life tenant (R. 10). By the local law of Michigan such a *cestui* takes no estate, either vested or contingent, and has only a chose in action:

> *C. L. 1929, Sec. 12982, Stat. Ann. 26.66;*
> *Palms v. Palms, 68 Mich. 355 at 380, 36 N. W. 419 at 439;*
> *Culbertson v. Witbeck, 127 U. S. 326 at 334-335, 32 L. Ed. 134 at 137.*

By the local law such a *cestui's* interest cannot be assigned:

> *Hunt v. Hunt, 124 Mich. 502, 83 N. W. 371;*
> *Weaver v. Van Akin, 71 Mich. 69, 38 N. W. 677.*

and it cannot be reached by his creditors:

> *Allen v. Merrill, 223 Mich. 467, 194 N. W. 131;*
> *Lee v. Enos, 97 Mich. 276, 56 N. W. 550.*

Michigan is one of the states in which a valid spendthrift trust may be created even though alienation is not expressly prohibited in the trust instrument:

> *Hackley v. Littell, 150 Mich. 106, 113 N. W. 787;*

*Perry v. Avery, 148 Mich. 211, 111 N. W. 746;*
*Fleming v. Wood, 147 Mich. 513, 111 N. W. 80;*
*Cummings v. Corey, 58 Mich. 494, 25 N. W. 481.*

The District Court found as a fact that the settlor's intention was such as to make this a spendthrift trust (R. 38) and this finding is now absolute, since the Trustee in Bankruptcy appealed to the Circuit Court of Appeals solely on a question of law (R. 41):

*Carter v. Powell (C. C. A. 5, 1939), 104 F. (2d) 428.*

The Circuit Court of Appeals based its decision (R. 49) upon a Michigan statute (C. L. 1929, Sec. 12955, Stat. Ann. 26.35) providing that expectant estates in land are descendible, devisable, and alienable. It failed to consider certain decisions of the Supreme Court of Michigan. These decisions announce, as a rule of property, that where the will bespeaks no different intention "it is a condition precedent to the remainderman taking any vested interest in such a contingent remainder that he survive the life tenant," and have refused to apply the statute in cases like the present one, because there is no "vested interest in the contingent remainder."

*In re Coots, 253 Mich. 208, 234 N. W. 141;*
*Hadley v. Henderson, 214 Mich. 157, 183 N. W. 75.*

This rule the State Legislature changed in 1931 by passing a statute permitting the transfer of such interests; but the statute only affects estates created thereafter, and cannot apply here:

*Act No. 211, Public Acts of 1931, Stat. Ann. 26.47;*
*Stevens v. Wildey, 281 Mich. 377, 275 N. W. 179.*

For a great many years we have had in Michigan the following statute (C. L. 1929, Sec. 12982, Stat. Ann. 26.66) which the Circuit Court of Appeals seems not to have considered:

> "Every express trust * * * shall vest the whole estate in the trustees in law and in equity, subject only to the execution of the trust; and the person for whose benefit the trust was created shall take no estate or interest in the lands, but may enforce the performance of the trust in equity."

Taking together this statute, and the fact that the testamentary trustees could have diverted the trust corpus before it reached the bankrupt, and that the bankrupt's right of inheritance was in any case contingent on an event which might never happen, we come within the rule stated in *16 A. L. R. 561:*

> "Where the beneficiary has no title, legal or equitable in the property, and no control over the trust, as where his rights rest absolutely in the discretion of the trustees, the property is not subject to the control of creditors, and the Trustee in Bankruptcy has no right therein."

This statement of the law is sustained by decisions of numerous state courts in cases where Trustees in Bankruptcy resorted to plenary suits in the local courts:

> *Brown v. Lumbert, 221 Mass. 419, 108 N. E. 1079;*
> *Robertson v. Schard, 142 Iowa 500, 119 N. W. 529;*
> *Peck v. Chatfield, 24 Ohio App. 176, 156 N. E. 459;*
> *Luttgen v. Tiffany, 37 R. I. 416, 93 Atl. 182;*
> *Bristol v. Atwater, 50 Conn. 402.*

and by decisions of Federal courts in bankruptcy:

> *In re Martin (C. C. A. 6, 1931), 47 F. (2d) 498;*

*Suskin & Berry v. Rumley (C. C. A. 4, 1930). 37 F. (2d) 304;*
*Jones v. Harrison (C. C. A. 8, 1925), 7 F. (2d) 461;*
*Allen v. Tate (C. C. A. 8, 1925), 6 F. (2d) 139;*
*In re Wetmore (C. C. A. 3, 1901), 108 F. 520;*
*In re Hoadley (S. D. N. Y., 1900), 101 F. 233.*

Because of the above statute, the beneficiary under a trust has no interest which is in the nature of real estate. Note *Hunt v. Hunt, 124 Mich. 502, 83 N. W. 371,* and *Weaver v. VanAkin, 71 Mich. 69, 38 N. W. 677,* where the point is stressed. The Circuit Court of Appeals cited a statute authorizing the alienation of interests in land, and construed it to apply to the *cestui's* interest, something which is not land. Upon this foundation it reversed the decision of the United States District Court sitting in Michigan. If everything else were left out of the case, we believe that this line of procedure is so illogical as to fully justify a review of the case in this court.

And furthermore, even if some basis could be found for treating as real estate the *cestui's* interest in a Michigan real estate trust, there is in this case the further fact that this trust was in part a trust of personal property. The theory of the lower court should have required the division of this interest into two parts, since Michigan has no statute relating to the alienation of future estates in personal property. At common law the interest of this bankrupt in the personal property is inalienable:

*3 Thompson on Real Property, Sec. 2161;*
*Gray, Rule Against Perpetuities (3d Edition), page 81;*
*Roberts, Transfer of Future Interests, 30 Mich. Law Review 349 at 352-355.*

We submit that insofar as this case is governed by the local law of Michigan, that law is correctly stated by the District Court in its opinion (R. 34-39).

## III.

**In holding the bankrupt's expectancy to be "property" within the purview of the Bankruptcy Act, the lower court decided a Federal question contrary to the decision of this court and of other Circuit Courts of Appeals.**

Section 70a (5) of the Bankruptcy Act (11 U. S. C. A. 110a) vests the Trustee with the bankrupt's "property." It is for the Federal Courts to say what is meant by "property"; the question does not depend on the local law at all:

*Board of Trade v. Johnson, 264 U. S. 1 at 10, 68 L. Ed. 533 at 536;*
*Page v. Edmunds, 187 U. S. 596, 47 L. Ed. 318.*

Where, as here, it depends on the discretion of the testamentary trustees whether the bankrupt ever gets any of the principal, the bankrupt's expectancy is too uncertain to be classed as property, and does not pass to the trustee in bankruptcy:

*Nichols v. Eaton, 1 Otto 716, 23 L. Ed. 254;*
*In re Martin (C. C. A. 6, 1931), 47 F. (2d) 498;*
*Suskin & Berry v. Rumley (C. C. A. 4, 1930), 37 F. (2d) 304;*
*Jones v. Harrison (C. C. A. 8, 1925), 7 F. (2d) 461;*

*Allen v. Tate (C. C. A. 8, 1925), 6 F. (2d) 139;*
*In re Harper (C. C. A. 2, 1907), 155 F. 105;*
*In re Wetmore (C. C. A. 3, 1901), 108 F. 520;*
*In re Hoadley (S. D. N. Y.), 1900, 101 F. 233.*

In the same way the Federal Courts have consistently held that the word "property," as used in Section 70a (5) of the Bankruptcy Act, does not include the heir's expectancy of inheritance from his ancestor, or the devisee's expectancy of inheritance from a testator still living, regardless of the fact that by the local law such expectancy may be classed as a property right subject to alienation, and notwithstanding that the ancestor or testator may have become incapable of altering the succession:

*In re Baker (C. C. A. 6, 1926), 13 F. (2d) 707;*
*Bank of Elberton v. Swift (C. C. A. 5, 1920), 268 F. 305;*
*In re Lage, 19 F. (2d) 153;*
*In re Hall, 16 F. Supp. 18;*
*In re Meiberg, 1 F. Supp. 892.*

As a practical proposition of fact, this bankrupt's possibility of inheriting any of the trust principal was far less definite than is the possibility of inheritance possessed by a legatee under mutual and reciprocal wills which have become irrevocable. If the latter is not to be offered to the public at a bankruptcy sale, neither should the former be.

The precedents cited in the opinion of the lower court as requiring a different conclusion, will be found on examination to be not inconsistent with the above statements. Thus, *McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015,* is not a bankruptcy case, but has to do with the construction of a will disposing of real estate in Ohio. *Comegys v. Vasse, 1 Pet. 193, 7 L. Ed. 108,* is not a bankruptcy

case, and deals with the assignability of personal injury claims for settlement under the provisions of an early treaty with Spain. *Pollack v. Meyer Bros. Drug Company (C. C. A. 8, 1916), 233 F. 861,* determined that a bankruptcy case ought to be reopened for the purpose of considering the status of a newly discovered trust interest; it expressly made no ruling as to the disposition of such interest. *In re Wright (C. C. A. 2, 1907), 157 F. 544,* holds that an insurance agent's contractural interest in renewal premiums is property within the meaning of the Bankruptcy Act, and *Fisher v. Cushman (C. C. A. 1, 1900), 103 F. 860,* is a similar holding with reference to an assignable liquor license.

It is believed, therefore, that the result reached in the Court of Appeals is not in accord with the weight of Federal authority.

## *CONCLUSION.*

The petitioner and his counsel believe that the District Court's opinion correctly stated the Michigan law and correctly applied the Bankruptcy Act as construed by the great weight of Federal authority. The Circuit Court of Appeals should have affirmed the lower court. The bankruptcy practice in many states will be unsettled if the Circuit Court of Appeals is correct in its view of the relationship of the Bankruptcy Act and the widely-adopted state laws here in question. Opportunity for review is therefore requested.

Respectfully submitted,

RICHARD FORD,
*Counsel for Petitioner.*

MERLIN WILEY,
HOWARD STREETER,
LEON R. JONES,
*Of Counsel.*

In The

# Supreme Court of the United States

October Term, 1940.

No. 428.

HAROLD H. MOORE, Bankrupt,
*Petitioner,*

v.

LEONARD HOBTON, Trustee in Bankruptcy,
*Respondent.*

## PETITIONER'S REPLY BRIEF.

RICHARD FORD,
*Counsel for Petitioner.*

MERLIN WILEY,
HOWARD STREETER,
LEON R. JONES,
C. WAYNE BROWNELL,
*Of Counsel.*

NATIONAL LAW PRINTING CORPORATION, 4432-39 Fifth Avenue, Detroit, Michigan
PLaza 7117

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### Cases Cited.



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*Respondent.*

## PETITIONER'S REPLY BRIEF.

### The Meaning Of the Bankruptcy Act.

**(Figures in parentheses refer to pages of the printed record, except as the context clearly indicates otherwise.)**

In our petition and brief we said (citing the cases) that the meaning of the word "property" in Section 70a(5) of the Bankruptcy Act (11 USCA 110a) was a Federal question, to be settled by the decisions of the United States courts rather than by decisions of state courts. Respondent in his brief (pages 3-4) answers that in *Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512*

it was decided that the state court decisions controlled the question of whether particular property could be transferred. *This evades the issue.* Whether something is property, and whether it is assignable property, are different questions. Our position is that the trust expectancy in question here, with the attributes given it by statutes such as are in force in Michigan and elsewhere, is not property within the meaning of the Bankruptcy Act.

**The Meaning Of State Statutes.**

The respondent's brief asserts (page 7) that the Michigan courts apply to trust interests the statutes regulating expectant legal estates in land, citing *In re Coots, 253 Mich. 208* and *Fitzhugh v. Townsend, 59 Mich. 427;* but the point was not raised in either one of those cases and the effect of C. L. 1929, Sec. 12982, was not there considered.

It is fallacious to say that the New York cases are strictly controlling. The statutes are not identical, in that the New York statutes relate to real and personal property and so might include the cause of action to which the *cestui's* trust interest has been reduced; while the Michigan statutes relate to real property only, as the Michigan courts have pointed out: *Palms v. Palms, 68 Mich. 355 at 379.*

The trial court found without contradiction that the testator's controlling intention was the protection of the widow, who actually survived for ten years and until long after the adjudication (38), and that the possibility of anything being received by this bankrupt

being so doubtful as to have no market value (38). By *Jones v. Harrison (C. C. A. 8, 1925), 7 F. (2d) 461* and *Perry v. Avery, 148 Mich. 211*, these facts are important *indicia* of a spendthrift trust.

The respondent's brief announces (page 9) that "none of the decisions of any other Circuit Court of Appeals in any way holds that the law of Michigan is different than that adjudicated by the Circuit Court of Appeals in the instant decision." *This again avoids the issue.* There is a conflict between the decision in the instant case and the decisions of the Supreme Court of Michigan; and there is a conflict between the decision in the instant case and the decisions of federal and state courts under similar local laws; the principal authorities are cited in our former brief, pages 11, 13-16.

**Analogy To Tax Cases.**

This court has recently considered the taxation of expectant interests, and has held that an expectancy similar to the one in dispute here has no value for tax purposes: *Humes v. United States, 276 U. S. 487, 72 L. Ed. 667.* By authority of *Helvering v. Hallock, 309 U. S. 106, 84 L. Ed. 382*, merely formal aspects ought not to be decisive:

> "It therefore becomes important to inquire whether the technical forms in which interests contingent upon death are cast should control our decision. * * * Such an essay in linguistic refinement would still further embarrass existing intricacies. It might demonstrate verbal ingenuity, but it could hardly strengthen the rational foundations of law. The law of contingent and vested remainders is full

of casuistries. * * * Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. *Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.*" (Italics added.)

The same thoughts apply to the problem of expectant trust interests in bankruptcy. The interest which the bankrupt had at the time of his adjudication, *before it was known whether or when or by whom the trust property would be enjoyed,* was not an asset in any commercial sense, or in any real sense. Under the existing decisions it ought not to be held to be property within the meaning of the Bankruptcy Act. The District Court, rather than the Circuit Court of Appeals, reached the more reasonable result.

Respectfully submitted,

RICHARD FORD,
*Counsel for Petitioner.*

MERLIN WILEY,
HOWARD STREETER,
LEON R. JONES,
C. WAYNE BROWNELL,
*Of Counsel.*

In The

# Supreme Court of the United States

October Term, 1940.

No. 428.

HAROLD H. MOORE, Bankrupt,
*Petitioner,*

v.

LEONARD HORTON, Trustee in Bankruptcy,
*Respondent.*

## PETITION FOR REHEARING.

HAROLD H. MOORE,
By RICHARD FORD,
*Counsel for Petitioner.*

MERLIN WILEY,
HOWARD STREETER,
LEON R. JONES,
C. WAYNE BROWNELL,
*Of Counsel.*

NATIONAL LAW PRINTING CORPORATION, 4432-39 Field Avenue, Detroit, Michigan
PLaza 7117

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*Respondent.*

## PETITION FOR REHEARING.

Now comes Harold H. Moore, Bankrupt, Petitioner, and presents this his petition for a rehearing of the above application for a Writ of Certiorari to be directed to the United States Circuit Court of Appeals for the Sixth Circuit; and in support of such petition he respectfully shows:

There continues to be a serious conflict between the several Circuit Courts of Appeals as to whether the language of Section 70 (a) of the Bankruptcy Act (11 U. S. C. A. 110a5) "property which prior to the filing

of the petition he could by any means have transferred" includes an interest subject only to *in futuro* transfer by estoppel, so-called. The division of authorities is now as follows: there is one Circuit Court of Appeals decision (or two, if the present case is counted) and at least two state supreme court decisions to the effect that such an interest is included (1); and there are two Circuit Court of Appeals decisions and at least one state supreme court decision to the contrary. (2)

Fiduciaries administering Michigan trusts, and creditors and trustees in bankrutcy in this state, who wish to enjoy their rights and perform their duties, are now caught between conflicting rules of law. The decision on which this review is sought seems to be authority for the proposition that the *cestui's* interest in this testamentary trust was personalty; in which event, by basing its decision on the Michigan real estate statute, the Circuit Court of Appeals has given to that statute a construction at variance with that given it by the Supreme Court of Michigan. (3) On the other hand if the court below intended to hold that the *cestui's* interest was not personalty, then its decision is authority against the application in bankruptcy of the Michigan statute defining the rights and interests of parties to trust, (4) and seems to determine the character of the estate in question ac-

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(1) *In re Landis, 41 F. (2d) 700 (C. C. A. 7, 1930); Reilly v. McKenzie, 151 Md. 216; Earle v. Maxwell, 86 S. C. 1.*

(2) *Suskin & Berry v. Rumley, 37 F. (2d) 304 (C. C. A. 4, 1930); In re Baker, 13 F. (2d) 707 (C. C. A. 6, 1926); Spengler v. Kuhn, 212 Ill. 186.*

(3) *C. L. Mich. 1929, Sec. 12955; Dolby v. State Highway Commissioner, 283 Mich. 609 at 620; Palms v. Palms, 68 Mich. 355 at 379.*

(4) *C. L. Mich. 1929, Sec. 12982; Culbertson v. Witbeck, 127 U. S. 326 at 334; Palms v. Palms, 68 Mich. 355 at 380.*

cording to what the court below considers to be general doctrines of the common law.

Hereafter in other litigation either the Supreme Court of Michigan or the Circuit Court of Appeals for the Sixth Circuit may recede from its position and adopt the view of the other court; but it is not probable that this will occur until after the Supreme Court of the United States intervenes. The justices of the Supreme Court of Michigan are likely to feel that it is their duty to follow their own precedents until they are expressly overruled and the Federal question, if any, framed definitely in this court. The judges of the Circuit Court of Appeals are apt to feel that denial of certiorari in this court so far amounts to an adoption of the instant decision by this court that they ought not to depart from it until it is expressly overruled here. In consequence, the law of trusts is likely to be one thing in the state courts, and something else in bankruptcy courts sitting in Michigan.

It may be said that this case is not entitled to review unless the question raised is one of public importance; but we must point out that the volume of business to be affected by this conflict of authority is large. Arizona, California, Delaware, the District of Columbia, Georgia, Idaho, Minnesota, Montana, New York, North Dakota, Oklahoma, South Dakota and Wisconsin have statutes similar to those of Michigan. (5). Probably in all of these states and certainly in Michigan, the number of testamentary trusts now being administered is large; in all these states the amount of bankruptcy business is considerable. All decisions in cases involving remainders and expectancies affect others than the immediate parties, since

(5) Statutes cited in the petition for certiorari, p. 11.

they become precedents for determining the rights of infants, incompetents, and other wards of the public.

This court has always indicated its desire to employ its Writ of Certiorari as a means of making uniform the rules of decision in the several circuits, and of preventing unnecessary conflicts between the Circuit Courts of Appeals and the higher courts of the several states. We therefore take this opportunity again to urge that this case be reviewed, so that this court can remove what is certain to become a serious and recurring conflict of authority.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit be, upon further consideration, reversed.

Respectfully submitted,

HAROLD H. MOORE,
By RICHARD FORD,
*Counsel for Petitioner.*

MERLIN WILEY,
HOWARD STREETER,
LEON R. JONES,
C. WAYNE BROWNELL,
*Of Counsel.*

## *CERTIFICATE OF COUNSEL.*

I, RICHARD FORD, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

RICHARD FORD,
*Counsel for Petitioner.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940

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No. 428

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HAROLD H. MOORE, Bankrupt
Petitioner

v.

LEONARD HORTON, Trustee in Bankruptcy,
Respondent

---

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JASON L. HONIGMAN,
Attorney for Leonard Horton,
Trustee in Bankruptcy and
Respondent.

ALBERT E. SMITH,
Of Counsel.

Interstate Brief & Record Co., Cass Bldg., 457 West St. W., Detroit

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### I.

**The Circuit Court of Appeals for the Sixth Circuit, in Deciding that the Bankrupt's Interest in His Father's Estate was Alienable Under Michigan Law and Therefore Vested in the Trustee in Bankruptcy Under Section 70a(5) of the Bankruptcy Act, Was in Complete Accord With the Law of Michigan.**

Under the will of his father probated in Michigan many years prior to the bankruptcy, the Bankrupt, Harold H. Moore, had an interest or estate which would ripen into

possession if he survived his mother, the life beneficiary (R. 8-12). By the express terms of the will, the assets of the estate consisting principally of real estate were put in trust with a life interest to the Bankrupt's mother and provision made for termination of the trust and division of the assets equally between the Bankrupt and his sister upon the mother's death. As to the share devised to the Bankrupt, the will provided:

> "I give, devise, and bequeath to my son, Harold H. Moore, absolutely, one of said shares" (R. 10).

At the time the Bankrupt filed voluntary bankruptcy proceedings, his mother was approximately seventy-five years old and had been bedridden for many years (R. 47). She died some two years later while the bankruptcy proceedings were pending (R. 47). The Trustee in Bankruptcy had in the meantime filed a Petition claiming the right to the Bankrupt's interest in said estate (R. 6). The question was thus presented whether the Bankrupt's interest in said estate belonged to the Trustee in Bankruptcy under applicable provisions of the Bankruptcy Act.

The adjudication in bankruptcy herein having taken place prior to the amendment of June 22, 1938 (Ch. 575, 52 Stat. 879), the Bankruptcy Act of July 1, 1898 (as amended), Ch. 541, 30 Stat. 565, was operative. Section 70a of said act (U. S. C. A. Title 11, Sec. 110a) provided as follows:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which

> is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *"

If the remainder interest of Harold H. Moore is 'property which prior to the filing of the petition he could by any means have transferred,' it passes under said act to the trustee in bankruptcy as an asset in bankruptcy. The standards by which we must judge whether property is capable of being transferred are determined by the local laws as declared by the state statutes and decisions.

> *6 Amer. Juris.*, Sec. 155, p. 600.
> *Spindle v. Shreve*, 111 U. S. 542, 28 Law. Ed. 512 (1884).
> *Suskin & Berry v. Rumley*, 37 Fed. (2d) 304 (C. C. A. 4, 1930).

In the *Suskin & Berry* case, *supra*, the Court held (305):

> "Whether such an interest in property passes to the trustee in bankruptcy and is subject to sale by him depends upon whether it is 'property which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him.' Bankruptcy Act, Sec. 70a(5), U. S. C. title 11 Sec. 110 (a) (5). And the determination of the question in a case such as this depends, not upon the law of the bankrupt's residence, but upon the law of the state where the trust was created and is being administered and where the property subject thereto is situate; that is, upon the law of Maryland."

The issue herein must therefore be determined by the law prevailing in Michigan 'where the trust was created

and is being administered and where the property subject thereto is situated.'

The Statutes in Michigan covering this situation are found in the following sections of the 1929 Michigan Compiled Laws:

"Section 12927. ESTATES IN LAND: KINDS AS RESPECTS TIME OF ENJOYMENT. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.

Section 12928. ESTATES IN POSSESSION AND IN EXPECTANCY; DEFINITION. An estate in possession is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to the possession is postponed to a future period.

Section 12929. ESTATES IN EXPECTANCY; FUTURE INTERESTS; REVERSIONS. Estates in expectancy are divided into:

First: Estates commencing at a future day, denominated future estates; and

Second: Reversions.

Section 12930. FUTURE ESTATE: DEFINITION. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.

Section 12931. REMAINDER. When a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

Section 12933. FUTURE ESTATES; VESTED, CONTINGENT; DEFINITIONS. Future estates are either vested or contingent:

They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate.

They are contingent whilst the person to whom, or the event upon which they are limited to take effect remains uncertain.

Section 12955. EXPECTANT ESTATES; QUALITIES. Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession."

These statutes clearly and definitely place contingent remainders on a par with vested remainders insofar as their transferability is concerned, and by the express terms of these statutes, all such estates are transferable. There is no doubt that a vested remainder is descendible, devisable and alienable. *6 Amer. Juris.*, Sec. 156, p. 600. That a contingent remainder is likewise descendible, devisable and alienable under these statutes has been held in the following Michigan cases:

*In re Coots' Estate*, 253 Mich. 208, 234 N. W. 141 (1931);

*Russell v. Musson*, 240 Mich. 631, 216 N. W. 428 (1927);

*Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505 (1896);

*L'Etourneau v. Henquenet*, 89 Mich. 428, 50 N. W. 1077 (1891);

*Fitzhugh v. Townsend*, 59 Mich. 427, 27 N. W. 561 (1886);

*Goodell v. Hibbard*, 32 Mich. 46 (1875).

In *Coots' Estate, supra*, the Court said (212):

"Concededly, the estate given to the nephews and nieces was a contingent remainder. 3 Comp. Laws

> 1915, Sec. 11531 (3 Comp. Laws 1929, Sec. 12933). The estate of each was descendible, devisable and alienable. 3 Comp. Laws 1915, Sec. 11553 (3 Comp. Laws 1929, Sec. 12955). The latter statute, however, did not enlarge the estate given, but merely established some of its incidents. Each remainderman 'could grant or devise no better or greater estate than he himself held; and any alienation or devise made by him would be defeated and destroyed by the same contingency which would have defeated his interest had he not disposed of it.' *Fitzhugh v. Townsend,* 59 Mich. 427, 436."

The sections of the Michigan Statutes above quoted are a portion of the Michigan Real Property Law which was literally adopted from the New York Real Property Law. *In re Coots' Estate, supra; In re Brown's Estate,* 198 Mich. 544, 559, 165 N. W. 929 (1917); *State v. Holmes,* 115 Mich. 456, 459, 73 N. W. 548 (1898). The New York Real Property Law (Consolidated Laws Ch. 50) contains the foregoing sections in practically identical form. This similarity of statutes makes decisions of the State of New York controlling precedents with respect to the question involved herein, particularly in the absence of any contrary decisions of the Supreme Court of Michigan.

The decisions in New York State, based upon the express provisions of statutes similar to the aforementioned Michigan statutes now definitely establish the rule that a bankrupt's remainder interest passes to his trustee in bankruptcy for the benefit of his creditors regardless of distinctions existing at the common law.

*Clowe v. Seavey,* 208 N. Y. 496, 102 N. E. 521 (1913).

*Tracy v. Coyle,* 201 N. Y. Supp. 250 (1923).

*Clark v. Grosh,* 142 N. Y. Supp. 966 (1912).

*In re St. John,* 105 Fed. 234 (D. C. 1900).
*In re Brands' Trust,* 281 N. Y. Supp. 548 (1935).
*Harlan v. Archer,* 79 Fed. (2d) 677 (C. C. A. 4, 1935).
*6 Amer. Juris.,* Sec. 156, p. 601.

In view of the identity of the sections of the Michigan Real Property Law with similar sections of the New York Real Property Law, we submit that the aforementioned New York decisions are controlling of the instant question. It is therefore clear that under the Michigan law a remainder interest such as the Bankrupt had in his father's estate passes to his Trustee in Bankrupty for the benefit of his creditors.

The Michigan cases cited by petitioner have no bearing upon the issues herein presented and are in no respect in conflict with the applicable law as contained in the foregoing statutory and judicial statements. As to the cases cited by petitioner from other jurisdictions, an analysis of them discloses that they are either inapplicable to the issues herein presented or arise in states having no statutes similar to those contained in Michigan.

Section 12982 (Michigan Compiled Laws 1929), cited in the Bankrupt's Petition at page 15, does not in any manner preclude the application of said Section 12955 to a trust beneficiary's interest in an estate. In both the *Coots'* case, *supra,* and the *Fitzhugh* case, *supra,* a trust similar to the instant trust was involved, and the Michigan Supreme Court held that the contingent remainderman's interest in the trust was an "estate" and was descendible, devisable and alienable under said Section 12955. It is conceded that this "estate" might be divested or defeated by the decease of the contingent remainderman prior to the life tenant, but it is nevertheless an estate which can be alienated.

Aside from the presence and effect of Section 12955, it is submitted that the Bankrupt's contention with respect to Section 12982 is directly contrary to the accepted common law rule which permits beneficial interests in trusts to be freely transferred and alienated unless such interests are made inalienable by the express provisions of the trust, as in valid spendthrift trusts, or by express statutory language.

*1 Scott on Trusts* (1939), pages 699, 700, 701, 732;
*1 Bogart, Trusts and Trustees* (1935), page 525.

The remainder interest of the Bankrupt sought to be reached by his creditors is not within any of the recognized exceptions of the general common law rule. Petitioner states in his brief that "The District Court found as a fact that the settler's intention was such as to make this a spendthrift trust (R. 38)" (Petitioner's Brief, p. 14). No such finding is to be found on page 38 of the Record or on any other page. The will, which is contained in the Record in its entirety (R. 8-12), makes no pretense at creating a spendthrift trust for the Bankrupt.

Petitioners attempted distinction between the rules applicable to real and personal property is not justified in view of the adjudication by the Michigan Supreme Court in the cases of *Hadley v. Henderson*, 214 Mich. 157, 183 N. W. 75 (1921) and *In re Coots' Estate, supra.* In the *Coots'* case the Court said (214):

> "It is argued that the Hadley case concerned the right to take personal property, a money bequest, and the present case involves real estate. That such difference might be of consequence was not suggested in the Hadley opinion. The Court applied to the bequest the law of real estate, both statutory and by citation of decision. Moreover, the rules governing future interests in real and

> personal property are substantially the same. *23 R. C. L.* p. 525; *Wessborg v. Merrill, supra; Winslow v. Goodwin,* 7 Metc. (48 Mass.) 363."

See also *3 Simes, Law of Future Interests,* Sec. 713, 714; *Meyer v. Reif,* 217 Wis. 11, 258 N. W. 391 (1935).

It is respectfully submitted that under the law of Michigan, the interest of the Bankrupt in his father's estate was alienable and was thus clearly such property as belonged to the Trustee in Bankruptcy under the Bankruptcy Act.

## II.

### The Decision of the Circuit Court of Appeals Is Not In Conflict With the Decisions of Any Other Circuit Court of Appeals or of This Court.

As hereinbefore set forth, the Circuit Court of Appeals by its decision herein, was required merely to ascertain the law of Michigan as to the alienability of the Bankrupt's interest in his father's estate. None of the decisions of any other Circuit Court of Appeals in any way holds that the law of Michigan is different than that adjudicated by the Circuit Court of Appeals in the instant decision. Such other Circuits as have passed upon the question of whether such property belonged to the Trustee in Bankruptcy have made no attempt at enunciating any rule other than that they were bound to ascertain the law of the local state as to whether the property in question was alienable.

As this Court pointed out in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 206, 82 L. E. 1290, 1292:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference in opinion in the state courts."

It is respectfully submitted that no valid basis has been advanced by petitioner for the granting of certiorari in the instant case.

Respectfully submitted,

JASON L. HONIGMAN,
*Attorney for Leonard Horton, Trustee in Bankruptcy and Respondent.*

ALBERT E. SMITH,
*Of Counsel.*